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21045,
21046

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MIGUEL LAMENCA,
JOSEPH SANTOS,
PEDRO MEZA-BUSTAMONTE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellants to be guilty as charged in both counts of a two-count indictment, following trial by jury.

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2 and 3231, and Title 21, United States Code, Section 176a. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

STATEMENT OF THE CASE

Count One of the two-count indictment alleged that appellants Miguel Lamenca, Joseph Santos, and Pedro Meza-Bustamonte and other persons conspired to smuggle marihuana into the United States [R.T. 392-93][1].

Count Two alleged that appellant Meza-Bustamonte smuggled approximately 95 pounds of marihuana into the United States and that appellants Lamenca and Santos knowingly aided, abetted, counseled, induced, and procured the commission of that offense [R.T. 393].

Jury trial of appellants commenced on November 16, 1965, before United States District Judge Fred Kunzel [R.T. 3]. The three appellants were found guilty as charged in both counts of the indictment on November 19, 1965 [R.T. 412-14].

Thereafter, on January 10, 1966, appellant Meza-Bustamonte was sentenced to ten years in prison upon each count, to run concurrently; appellant Lamenca was sentenced to fifteen years in prison upon each count, to run concurrently; and appellant Santos was sentenced to twenty years in prison upon each count, to run concurrently. The sentence of Meza-Bustamonte was later reduced to five years upon each count, to run concurrently [C.T. 26-28][2].

Appellants subsequently filed notices of appeal [C.T. 29-31].

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[1] "R.T." refers to the Reporter's Transcript of Proceedings.

[2] "C.T." refers to the Clerk's Transcript of Record.

ERROR SPECIFIED

Appellants specify the following points upon appeal:

"1. Appellants were prejudiced by the trial court's refusal to require identification of the informant who was a material witness on the issue of guilt or innocence.

"2. Each of appellants was substantially prejudiced by the erroneous admission of statements obtained in derogation of their rights counsel and their right to remain silent.

"3. The evidence was insufficient as a matter of law to sustain the connection of two of the appellants." (i.e., Lamenca and Santos).

(Appellants' Opening Brief, p. 5-a).

IV

STATEMENT OF THE FACTS

Appellant Meza-Bustamonte entered the United States from Mexico at San Ysidro, California, at approximately 5:40 p.m. on May 7, 1965. He was the driver and sole occupant of a 1955 Chrysler automobile [R.T. 47-48].

He told Customs Inspector Lloyd Hanson that he had no merchandise from Mexico. He became nervous and started sweating. Inspector Hanson questioned him concerning ownership of the vehicle and was told that it belonged to "friends." The vehicle was taken to the secondary inspection area, where 46 packages were found under the fenders and 5 more inside a rear door [R.T. 47, 49-50].

It was stipulated that a chemist would testify that samples taken from

"chain of possession" of the packages [R.T. 50-51, 68-69, 215]. The packages weighed approximately 95 pounds. The selling price of the marihuana in Tijuana, Mexico, was approximately $1,425 [R.T. 51, 70].

A piece of green newspaper material was found in the watch pocket of Meza-Bustamonte. This piece of paper contained handwriting, including the number, "6 2312."[R.T. 52-53].

The billfold of Meza-Bustamonte contained a sales slip in the Spanish language with the purchaser listed as "Patricio Becerra." The reverse side contained the following:

"Hailanderl
Motel 126
Hailand Ave.
126."

[R.T. 56-57; Government Exhibit 4, Supplemental Transcript of Record].

Appellant Joseph Santos entered the United States from Mexico at the same port of entry (San Ysidro) at approximately 6:10 p.m. on the same date [R.T. 59], about 30 minutes after the entry of Meza-Bustamonte. He was the driver and sole occupant of a 1965 Impala automobile. He was "rather nervous" [R.T. 59-60].

The Impala was sent to the Customs secondary area, where a search occurred and a license plate receipt was found underneath the floor mat in front of the front seat. The receipt was in the name of Joseph Santos. It was for a 1963 Cadillac Automobile with license number 212-JS, and it showed a transfer of ownership to Patricio Becerra, [R.T. 60,64-65; Government Exhibit 7, Supplemental Transcript of Record].

A Highlander Motor Hotel key, number 126, was in the possession of Santos. The address of the motor hotel was 2051 N. Highland Ave., Hollywood, California [R.T. 71; Government Exhibit 9, Supplemental Transcript of Record].

Santos also had an Econo-Car business card which contained the number, "DU 6-2312," in hand-printing upon the reverse side [R.T. 71-72; Government Exhibit 10, Supplemental Transcript of Record]. "DU" was the prefix used for Tijuana telephone numbers [R.T. 75].

Santos also had an installment promissory note involving the purchase of a 1963 Cadillac. The document was dated December 20, 1962, and involved payments amounting to $2280. The Cadillac serial number upon this document was the same as the Cadillac vehicle identification number upon the receipt found underneath the floormat [R.T. 72] Government Exhibits 7, 11, Supplemental Transcript of Record].

United States Customs Agent Walter Gates advised appellant Santos concerning his legal rights and questioned him. Santos stated that he had come to the West coast to see the country; that he had left New York City by United Air Lines by himself on May 6, 1965; that he then had approximately $600 in his possession; that he rented a car in Los Angeles and went to a motel; that he drove to Tijuana by himself upon the following day; and that a girl gave him her telephone number there, 6-2312 [R.T. 68, 72-74].

Agent Gates then informed Santos that the officers were aware that a Mr. Lamenca had checked into the motel with him at Los Angeles. Santos replied that Lamenca had come with him from New York; that Lamenca was

had gone with him to Tijuana on the trip; that Lamenca stayed in Tijuana; and that Lamenca did not have a key to the motel room [R.T. 74].

Santos was then advised that Mr. Meza-Bustamonte had the same telephone number that Santos had and that Mr. Meza-Bustamonte had a piece of paper with the words "Highlander Motel, 126, Highland Avenue," which exactly fit the motel key designation on the key in the possession of Santos [R.T. 74-75]

Santos stated, "The damage is done now." [R.T. 75].

He also stated that he had made a sale, in New York City, of a 1963 Cadillac, selling it to a male Mexican who had been introduced to him by Mr. Lamenca. He stated that the true purpose of the trip by air to the West Coast was to recover the New York license plates which were still on the vehicle [R.T. 75].

Supervisory Customs Port Investigator Robert L. Rainsberger talked to appellant Lamenca on the night of May 7, 1965, at Lamenca's room at the Highlander Motel, 2051 North Hollywood Avenue, Hollywood, California. Lamenca was advised concerning his legal rights. He had $4500 in cash in his possession [R.T. 88-90, 92].

Lamenca stated that on the night of May 6, he came to Hollywood, California, from New York City by United Air Lines with his employer, a Mr. Santos; that they came to the Hollywood area and registered at the Highlander Motel; that his reason for coming was to visit and also because his employer had asked him to come out at no expense to Lamenca; that Santos gave him $4000 to hold for safekeeping; that on May 7, Santos told

Lamenca that he had to go somewhere; and that Lamenca did not ask him where he was going [R.T.91] .

Lamenca also stated that he had gone to see a movie that day, but he added that he did not remember what it was about. Lamenca had only $5 of his own in his possession. He stated that his address was 860 Hunts Avenue, Bronx 59, New York [R.T. 91-93,106]. Lamenca had moved from 860 Hunts Avenue to 810 Hunts Avenue prior to October 9, 1964, and moved from 810 Hunts Avenue to a third address on October 9, 1964 [R.T. 139-40].

Lamenca was not arrested by Investigator Rainsberger [R.T. 101]

Customs Agent Finbarr J. Murphy interviewed appellant Santos on May 18, 1965, in New York City, for the purpose of obtaining information concerning a Volkswagen that was under seizure and obtaining the New York registration form for the Volkswagen. Santos stated that agents in San Diego had the registration.

Agent Murphy said, "Okay, that's what I was after." Santos followed Murphy to the door and started to talk about the Cadillac involved in the San Ysidro case. Murphy asked Santos whether he had an attorney, Santos replied in the affirmative, Murphy mentioned the possibility of obtaining an attorney in New York, and Santos continued to talk about the Cadillac[R.T.10-11, 107-09][3].

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[3] A portion of this testimony regarding the purpose of the interview and the discussion of the right to counsel was heard outside of the presence of the jury.

to a Mexican resident of Tijuana; that the sale was for $4000; that the money was paid to Santos at his place of business in the Bronx; that the Mexican drove away with the car from the place of business in the Bronx, headed for Tijuana; that the New York license plates were still attached to the vehicle; and that he, Santos, had never been to California before May, 1965 [R.T. 109-10].

However, Trans World Airline records and Diners' Club records showed a charge to appellant Santos for $152.36 for an air flight from New York to Los Angeles on December 9, 1964 [R.T. 174-75, 201-03].

On March 21, 1965 (the day before the March 22 date furnished by appellant Santos as the date of the alleged sale of the Cadillac in New York), the 1963 Cadillac with New York license number 212-JS was stopped 23 miles east of Grants, New Mexico, by New Mexico State Police Patrolman Albert Benavidez. It was headed in a westerly direction and was being driven by one "Iglesias." Appellant Lamenca was a passenger [R.T. 109-10, 142-44].

"Iglesias" told Officer Benavidez that he was assisting Lamenca with the driving. Lamenca stated that they were driving the vehicle to California to sell it for the owner, who was his employer in New York. They had no title, registration, or power of attorney for the sale. They said that Joseph Santos in New York owned the vehicle. A collect telephone call was placed to Santos and "we had a hard time getting Mr. Santos to accept the phone call, since he, he didn't know anything about a '63 Cadillac." [R.T. 144-45].

However, after being advised that it was just a routine check, Santos

for resale. Santos was informed that Lamenca would be cited for a tax violation, and the conversation terminated [R.T. 145-46].

Lamenca subsequently told Officer Benavidez that Santos was going to bring a girlfriend to California in two or three days and that that was the reason for the story about a resale. Another telephone call was placed to Santos, and Benavidez asked if he could speak or if his wife was probably on an extension. Santos said that he could speak, and was told about the girlfriend story, and replied that there was no girlfriend and that the car was coming to California for sale [R.T. 146-47].

The two telephone calls were made to a telephone registered in the name of Daisy Trujillo, the wife of appellant Santos [R.T. 145, 159,178]. Officer Benavidez saw appellant Lamenca between approximately 2 p.m. and 4:50 p.m. on March 21 [R. T. 142,144].

Records of the Hollywood Hills Motel in Hollywood showed that Mike Lamenca and "J. Islesia" registered there on March 22, 1965, having a Cadillac with New York license 212 JS, and that they were continuously registered there through April 8, 1965 [R.T. 151-53; Government Exhibit 20, Supplemental Transcript of Record].

On April 6, 1965, a telegram was sent from New York to Hollywood, California, addressed to Mike Lamenca at the Halls Motel. It read as follows:

"Ccme today.

Joe." [R.T. 159, 162-64].

The telegram had been charged to CA 1-8975, the Daisy Trujillo telephone

Other records listed motel registrations by appellant Lamenca in Hollywood from October 9, 1964, to October 13, 1964; October 21, 1964, to October 28, 1964; and January 29, 1965, to February 22, 1965. During the latter period he was registered with one "J. Perez." [R.T. 206, 208, 211, 213]. "J. Perez" appeared to be similar to Wilfredo Iglesias Perez, who was the "Mr. Iglesias" who was riding with appellant Lamenca in New Mexico on March 21, 1965 [R.T. 144, 147-48, 178, 208-09].

M. Lamenca at 206 60th Street, West New York, had a telephone from which a call was placed to Tijuana, Mexico, on May 4, 1965. Appellant Lamenca lived at 206 60th Street [R.T. 119, 168-69].

Appellant Meza-Bustamonte testified that he was innocent and had never seen appellants Lamenca and Santos before he was arrested; that on May 7, he received the vehicle in which he was later arrested; that the vehicle was delivered to him by two persons whose names he did not know; that they offered him a ride to Los Angeles if he would drive the vehicle across the border to San Diego; that the reason for these border-crossing procedures was the fact that he did not have immigration papers, although he had a document authorizing his entry into the United States; that they gave him no money; that one of them said that they had to meet another friend at the Greyhound Bus Depot at San Ysidro; and that he was going to meet the men in San Diego where the ferry goes to Coronado [R.T. 239-42, 244, 254-55, 285].

Meza-Bustamonte also testified that he "thought they probably had tequila or something unlawful to pass"; that he searched the vehicle and

that had been given to him by one "Antonio Lopez" for the purpose of betting upon the fights in Los Angeles; that the piece of paper with telephone number 6 2312 was given to him by a girl named "Maria Luisa"; and that he made no attempt to obtain "Antonio Lopez" and "Maria Luisa" as witnesses at the trial [R.T. 241, 243, 246, 248, 257, 292-93]. He also testified that the interrogating agent threatened to put him in jail for 50 years if he did not admit that another piece of paper was in his possession, and that Agent Gates made threats in connection with his inability to see his family again and told him to say that the $100 was furnished by Santos [R.T. 266, 289].

Meza-Bustamonte denied under oath that the Patricio Becerra "Hailanderl Motel" slip had been in his possession; that the $100 consisted of five twenty-dollar bills; and that he was nervous when he talked to Inspector Hanson [R.T. 243, 250, 255, 263]. He also denied that he had previously stated that he did not know where the telephone number (6 2312) came from or why he wrote it down; that he had stated that he was going to San Ysidro; that he had stated that a man named "Antonio" had given him the vehicle; and that he had stated that this "Antonio" came by his place of employment and offered him a ride to Los Angeles for $3.50 [R.T. 249-251, 253, 290].

Agent Gates testified that Meza-Bustamonte had stated that the car in which he was riding at the time of his arrest was furnished to him by a man named "Antonio", that "Antonio" met him at Meza-Bustamonte's place of employment, and that he was to pay "Antonio" $3.50 for the ride to Los

with a 50-year sentence, that he did not threaten the suspect in regard to seeing his family, and that he did not tell the suspect what to say [R.T. 331-33].

David Burnett testified that Meza-Bustamonte had stated that he obtained the automobile, in which he was riding when arrested, from one "Antonio," and that Agent Gates made no threats in regard to the suspect seeing his family or receiving a long prison sentence. He also testified that Agent Gates did not tell Meza-Bustamonte to say that he knew Santos [R.T. 343-45].

Inspector Hanson testified that Meza-Bustamonte stated that he did not know why he put the piece of paper (with the 6 2312 number) in his watch pocket and did not know what it meant [R.T. 360]. Hanson testified under cross-examination that Agent Maxcy told him that the number was a marihuana dealer's number [R.T. 362-63].

Additional testimony was received outside of the presence of the jury upon the question of revealing the informant. Agent Gates testified that he believed that the informant would be "done away with" if Patricio Becerra ascertained his identity, and that information had been received in connection with the Chrysler as well as the vehicle later driven by Santos. He testified that the informant told him that the Chrysler had been driven into a Tijuana garage belonging to Patricio Becerra, that Becerra entered the garage with several gunnysacks, that two men arrived in a Chevrolet which went into the garage, stayed there for about five minutes, and was taken out and parked upon the street, that the Chrysler went into the garage

area. The Chevrolet was the same one in which Santos crossed the border just before his arrest [R.T. 299, 301-03].

Appellant Santos testified (outside of the presence of the jury) that he sold the Cadillac for $4000 to "Patricio Becerra," who later turned out to be the nephew of Patricio Becerra; that Lamenca was to transport the vehicle to Los Angeles; that he went to Tijuana in order to talk to Becerra in connection with the registration of the vehicle; that he was in Tijuana on May 7, 1965; and that he went to talk to Becerra, parked nearby, went to get something to eat since Becerra was not there, returned, and found the vehicle parked at the same location [R.T. 313-14, 318-19]. He also testified that he was with Mike Lamenca in Tijuana and that he, Santos, had rented the Chevrolet [R.T. 313, 317].

The request for disclosure of the informant was denied. The trial Judge stated that the testimony of Santos was "pure fabrication" and added:

> "From what Mr. Santos said, it is the most unbelievable story I believe that possibly he could have told us, and I just would not cause a dismissal of this case on the basis of what he claims." [R.T. 320, 327-28].

Appellant Santos did not testify before the jury. Appellant Lamenca did not testify [R.T. 295, 329].

V

ARGUMENT

A. FAILURE TO REQUIRE DISCLOSURE OF THE INFORMANT DID NOT CONSTITUTE ERROR.

Appellants complain that the failure of the trial Court to require disclosure of the informant constituted error.

Appellant Meza-Bustamonte made no request for disclosure of the informant, so he may not raise the issue in this appeal. An issue must be raised in a timely fashion in the trial court.

Ramirez v. United States, 294 F.2d 277, 283 (9th Cir. 1961);

Stein v. United States, 166 F.2d 851, 855 (9th Cir. 1948), cert. denied, 334 U. S. 844 (1948)

While the remaining appellants rely upon the theory that the informant might possibly be a potential witness, it is evident that this was a matter of no importance to appellant Lamenca at the trial, because his counsel announced that he was "not going to introduce or present any evidence." [R.T. 295]. It was after this that counsel for appellant Santos made the request for disclosure of the informant. Appellant Lamenca joined in the request although he had already, in effect, rested his case [R.T. 296-97]. It is clear that the alleged error did not affect the substantial rights of appellant Lamenca and therefore should be disregarded under Rule 52(a) of the Federal Rules of Criminal Procedure.

Turning then to the question of the potential effect upon the defense of appellant Santos, it is readily apparent that he is pushing against the current of a long line of appellate decisions in Customs cases. This Court had repeatedly upheld denials of motions to require disclosure of informants in smuggling cases.

Smith v. United States, 9 F.2d 386, 387 (9th Cir. 1925);

Jones v. United States, 326 F.2d 124, 127, 129 (9th Cir. 1963), cert. denied, 377 U.S. 956 (1964);

Hurst v. United States, 344 F. 2d 327, 328 (9th Cir. 1965);

Cook v. United States, 354 F.2d 529, 531 (9th Cir. 1965);

King v. United States, 348 F.2d 814, 819 (9th Cir. 1965), cert. denied, 382 U.S. 926 (1965);

Alexander v. United States, 362 F.2d 379, 383 (9th Cir. 1966);

Garibay-Garcia v. United States, 362 F.2d 509 (9th Cir. 1966);

Aguilar v. United States, 363 F.2d 379, 381 (9th Cir. 1966).

Appellants would seek to find an exception to the well-established rule merely because the informant observed a preliminary step in what appellants believe was the loading of the automobile involved in the smuggling Appellant Santos refers to the necessity for disclosure in regard to his defense as an alleged principal and also as an aider and abettor, since it is asserted that the informant would be helpful in the defense of Meza-Bustamonte, and that Santos would not be guilty unless Meza-Bustamonte was guilty.

However, proof of guilt of Meza-Bustamonte was not essential in connection with the conspiracy conviction of Santos, as it would be sufficient to prove that Santos conspired with Miguel Lamenca or one of the "other persons to the Grand Jury unknown"(e.g., Patricio Becerra, or the person who sold the marihuana in Mexico). While the primary alleged overt act seemingly required an offense by Meza-Bustamonte, this was mere surplusage. Proof of an overt act is not required in a Title 21 conspiracy case.

Leyvas v. United States, 371 F.2d 714, 717 (9th Cir. 1967). Surplusage in an indictment "is innocuous and may be ignored."

Raymond v. United States, 9th Cir. No. 20,668, April 14, 1967.

While proof of Meza-Bustamonte's guilt under Count Two possibly would be essential in order to sustain the convictions of Santos and Lamenca for aiding, abetting, etc., under that count, it is not necessary to discuss that possibility, because the problem does not exist as to Count One (the conspiracy count), and concurrent sentences were imposed in the cases of Santos and Lamenca.

Where concurrent sentences are imposed, conviction upon a particular count is not subject to attack upon appeal if there is a valid conviction upon another count involving an equal penalty.

Lawn v. United States, 355 U. S. 339, 359, 362 (1958);

Fenton v. United States, 308 F. 2d 246 (9th Cir. 1962).

There is no reason to believe that the informant would be a helpful witness in the defense of appellant Santos. Indeed, all of the indications are to the contrary. Agent Gates testified that the informant told him that two men arrived at the garage in the Chevrolet, they took it into the garage, it stayed there for about five minutes, and it was taken out and parked; that the Chrysler went into the garage immediately afterwards; and that the men from the Chevrolet stayed in the area [R.T. 303].

This is inconsistent with the testimony of appellant Santos to the effect that he had rented the Chevrolet, went to the location with Lamenca, left the car on the street, went to eat, returned, and found the Chevrolet at the same location [R.T. 314, 317].

When the question of disclosure or non-disclosure of a confidential

"The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense."

Roviaro v. United States, 353 U. S. 62 (1957).

The weight upon the non-disclosure side of the balance is readily appreciated. The United States Supreme Court recently considered a probable cause-informant privilege question and quoted with approval the statement that "we accept the premise that the informer is a vital part of society's defensive arsenal."

McCray v. Illinois, United States Supreme Court, March 20, 1967.

Other authorities have commented upon the vital importance of informants:

"Most of the large seizures of heroin, diamonds, gold,and other contraband have been discovered because someone gave advance information. Customs agents readily concede that most smuggling rings are broken up because of the tips that come from informers who often play a deadly and dangerous game."

"Border Guard," Don Whitehead, New York, 1963, p. 115

"The most important espionage case in American history was solved through the services of a paid informant of the FBI." J.Edgar Hoover, 58 Yale Law Journal 404.

"Ninety per cent of the convictions had in the trial court for sale and dissemination of narcotic drugs are linked to the work and the evidence obtained by an informer. If that informer is not to have

his life protected there won't be many informers hereafter."

(Emphasis added.)

United States v. Estep, 151 F. Supp. 668, 672-73 (N.D.Texas 1957).

In Estep, supra, the Court took judicial knowledge "of a number of informers that have appeared in his court who have been murdered or foully treated." These murders of Federal informants were accomplished by such means as stabbing, machine gun fire, drowning, throat-cutting, and head-smashing.

In Aguilar v. United States, supra, at p. 381, this Court upheld the denial of the motion to require disclosure of the informant in a border-crossing marihuana-smuggling case and noted that disclosure will sometimes "imperil the life of the informer in this dirty business."

What, then, are the weights upon the other side of the balance?

"Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

Roviaro, supra, at p. 62.

The "possible defenses" that might be promoted by disclosure of the informant were lacking in substance. The defense appeared to be concerned with a trip by air from New York City to Los Angeles and an additional trip from Los Angeles to Tijuana, Mexico, all for the purpose of discussing registration upon an automobile. It is not surprising that the trial Judge, who was the trier of fact upon the issue, concluded that the tale related by

327-28] .

The "possible significance of the informer's testimony" includes the fact that in the doubtful event that he could be brought within the jurisdiction of the court, he presumably would testify that he observed the events provided in his account to Agent Gates. While there is no indication that any of this would be favorable to appellants, there is clear indication that some of it would be unfavorable. The statement to the effect that two men put the vehicle in the garage contradicts the version of appellant Santos. This indicates that Santos was committing perjury if the jury believes the theoretical witness. If the jury does not believe him, he does not assist the appellant's defense.

Consequently, appellant Santos has a much heavier burden than the defendant in Hurst, supra, at p. 328, where "mere hopeful guessing," a "'shot in the dark,'" was not a sufficient basis for a requirement that the informant be revealed. Here, appellant Santos not only bases his argument upon hopeful speculation that the informant will say something new that will assist him, but he also must hopefully guess that the informant will repudiate and retract one of his statements to Agent Gates [R.T. 326] .

An evidentiary privilege involving "a vital part of society's defensive arsenal,"[4] should not be cast aside upon such frail and unsupported speculation.

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[4] McCray, supra.

disclosure of the informer's identity to the appellant would have been relevant or helpful or essential to appellant for a fair trial."

Appellants also contend that error occurred when the trial Court mentioned the fact (outside of the presence of the jury) that appellant Santos might testify.

Without conceding that this remark constituted error, it is sufficient to note that no harm resulted from the remark or from the testimony by Santos, so there is nothing of which to complain. Appellants did not list this particular point in their Specification of Errors [Appellants' Opening Brief, p. 5-a].

Appellants also complain that a Customs inspector stated that there was a "lookout" that might connect Santos and Meza-Bustamonte. This appeared to be a legitimate statement in response to a question by counsel for appellant Santos. However, it was stricken from the record [R.T. 364-65], and appellants do not list this point in their Specification of Errors.

B. STATEMENTS BY APPELLANT MEZA-BUSTAMONTE WERE PROPERLY RECEIVED IN EVIDENCE.

Appellant Meza-Bustamonte complains that statements by him were received in evidence without a showing that he was advised of his legal rights in Spanish or English.

Since Meza-Bustamonte made no objection in the trial Court in regard to this matter [R.T. 330-33, 343-45], he may not raise the issue in this appeal. Issues must be raised in a timely fashion in the trial Court.

Ramirez, supra, at p. 283.

v. Arizona, 384 U.S. 436 (1966), is inapplicable.

Johnson v. New Jersey, 384 U. S. 719, 734 (1966).

Furthermore, this appellant was advised of his legal rights (except for the Miranda warning). The conversation was in Spanish [R.T. 331].

C. STATEMENTS BY APPELLANT LAMENCA WERE PROPERLY RECEIVED IN EVIDENCE.

Appellant Lamenca contends that there was no showing that he intelligently waived the right to counsel when he made certain statements upon July 22, 1965.

Appellant Lamenca was advised of his legal rights, including the right to counsel, on July 22 [R.T. 111]. He also had been advised of his rights on May 7, 1965 [R.T. 89-90]. The specific requirements of the subsequent Miranda decision were not satisfied and are not relevant here.

Lamenca understood English but was not proficient at speaking in the English language. Investigator Rainsberger stated:

"He spoke quite well. We had no difficulty during approximately two hours of our conversation." [R.T. 31, 90-91].

The fact that Lamenca had an interpreter at the trial is immaterial. He may not create "evidence" by requesting an interpreter.

The statements of July 22 were quite innocuous, as similar statements had been made to Investigator Rainsberger on May 7, 1965, and these were received in evidence without objection by appellant Lamenca [R.T. 89-91]. The July 22 statements involved admissions by Lamenca that he had been

Tijuana before; that Santos paid the fare on the May 1965 flight; and that the $4000 or $4500 belonged to Santos [R.T. 111-12]. The statements concerning Santos were similar to those made in the May 7th interview [R.T. 91]. The statements regarding trips to California were unimportant, in view of the fact that motel records and the testimony of Officer Benavidez provided the same evidence. Consequently, assuming arguendo that there was error here, it is respectfully submitted that it was harmless error.

D. STATEMENTS BY APPELLANT SANTOS WERE PROPERLY RECEIVED IN EVIDENCE.

Appellant Santos contends that statements made by him without the presence of his counsel were improperly received in evidence. He refers to the statements made to Agent Murphy on May 18, 1965.

Previously, on May 7, 1965, Agent Gates advised Santos concerning his legal rights, including the right to an attorney [R.T. 72]. On May 18, Agent Murphy went to see Santos for the purposes of obtaining information concerning a Volkswagen that was under seizure and obtaining the New York registration form for the Volkswagen [R.T. 10, 108].

After Santos stated that the agents in San Diego had the registration, Agent Murphy said, "Okay, that's what I was after," and started to leave. Santos followed Murphy to the door and began to talk about the Cadillac. Murphy asked Santos whether he had an attorney and Santos replied that he had one in San Diego. Murphy asked him if he had a lawyer in New York. Santos replied in the negative and said that "he didn't think it was necessary."

Murphy stated that it would be right for Santos to get a lawyer in New York, and Santos continued to talk about the Cadillac. Murphy warned him that anything that he said regarding the Cadillac could be used against him. Santos continued to talk about the Cadillac [R.T. 11].

It would be difficult to find a clearer case of a free and voluntary waiver of the right to counsel.

Appellant Santos was not greatly concerned about this issue during the trial. Before the Government's opening statement, counsel for the Government suggested that there might be a dispute concerning the question of waiver of the right to an attorney, and counsel for appellant Santos briefly noted that there would be an objection upon the ground that the defendant was not advised of his legal rights. However, he emphasized a corpus delicti objection in his comments to the Court [R.T. 12-15].

When the evidence of the conversation was offered during the trial, the following objections occurred:

"MR. CASTRO:[5] Just for the record I would renew my objection.

"MR. SHEELA:[6] Also for the record I renew the corpus delicti objection, your Honor.

"THE COURT: That is overruled."

[R.T. 108].

By renewing one objection without renewing the other, counsel implicitly abandoned the latter objection. Assuming arguendo that he did not abandon

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[5] Counsel for appellant Lamenca.

[6] Counsel for appellant Santos.

ing his legal rights), the objection was not good. Santos was advised concerning his legal rights before he made any significant statements [R.T.11], and he had previously been advised of his legal rights on May 7 as well [R.T.72].

Appellants also note that appellant Santos spoke Spanish and had an interpreter at trial. He apparently did not need the interpreter, because he answered questions in English from the witness stand until his counsel stopped him from doing so [R.T.312]. Agent Murphy testified that Santos "speaks good English." He added: "He speaks as well as I do." [R.T.29]

Appellants imply that Agent Murphy wrongfully visited Santos with the intention of interrogating him in the absence of his counsel, rather than for the purpose of checking upon the Volkswagen registration. However, Murphy testified that the purpose was to obtain the Volkswagen registration [R.T. 108]. He also testified that he had called Mrs. Santos upon one occasion and asked her for the registration [R.T. 128].

Considering the rule that evidence upon appeal is viewed in the light most favorable to the prevailing party in the trial court,[7] it is evident that an improper purpose cannot be inferred from the mere fact that Murphy asked one or more questions [R.T.134] after Santos had already waived the right to counsel.

Appellants cite Crooker v. California 357 U.S.433 (1958); Spano v. New York, 360 U.S.315 (1959); Massiah v. United States, 377 U.S.201 (1964; and Escobedo v. Illinois, 378 U.S.478 (1964).

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[7] Hiram v. United States, 354 F.2d 4,7 (9th Cir.1965).

Crooker has been overruled.

Miranda, supra, p. 479, n. 48.

Spano and Escobedo both involved refusals of requests by suspects who wished to have the assistance of counsel. The suspects were in custody in both cases. Spano was concerned with the question of voluntariness of the statement, an issue not involved in the instant appeal.

In Massiah the suspect did not waive his right to counsel because he did not even know that he was being interrogated.

Appellant Santos was not in custody, was not denied the right to assistance of counsel, and was not secretly interrogated. He voluntarily waived the right to counsel.

E. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION OF APPELLANT SANTOS.

It is respectfully submitted that the evidence was sufficient to sustain the conviction of appellant Santos. He crossed the border at the scene of Meza-Bustamonte's entry, about 30 minutes after Meza-Bustamonte crossed with marihuana worth approximately $1425 in Mexico [R.T. 47-48, 50, 59, 70, 215].

Appellant Santos was "rather nervous." [R.T. 59-60]. A license plate receipt was under the floor mat of the vehicle operated by Santos. It showed a transfer of ownership of a 1963 Cadillac from Joseph Santos to Patricio Becerra [R.T. 64-65; Government Exhibit 7, Supplemental Transcript of Record]. Meza-Bustamonte's billfold contained a sales slip with the purchaser listed as Patricio Becerra. The reverse side of this paper contained the

Highlander Motel 126 ("Hailanderl") notation. Santos had the key to Room 126 at the Highlander Motel (Motor Hotel). [R.T. 56-57, 71; Government Exhibits 4, 9, Supplemental Transcript of Record].

Santos had a card containing the number, "DU 6-2312," in hand-printing on the reverse side. Meza-Bustamonte had the number, "6-2312," on a piece of green newspaper material in his watch pocket [R.T. 52-53, 71-72; Government Exhibit 10, Supplemental Transcript of Record].

"DU" was the prefix used for Tijuana telephone numbers[R.T. 75]. Santos admitted that he had obtained the 6-2312 telephone number in Tijuana, and Meza-Bustamonte testified that his 6-2312 number was a Tijuana telephone number [R.T. 74, 269-70].

When Santos was informed by Agent Gates that Meza-Bustamonte had the same telephone number and the Highlander Motel 126 notation, Santos made the very damaging admission:

"The damage is done now." [R.T. 74-75].

Santos admitted that Lamenca had come with him from New York to Los Angeles and then to Tijuana [R.T. 74]. Lamenca was found in the Highlander Motel room on the same evening. He had $4500 in his possession [R.T. 89-90, 92]. These facts indicate the existence of a joint criminal venture of the nature found in Eason v. United States, 281 F.2d 818 (9th Cir. 1960).

When interviewed by officers, Santos made some statements which were patently absurd and others which were directly contradicted by evidence viewed in the light most favorable to the Government, and therefore constituting falsehoods tending to show consciousness of guilt.

The absurd statements involved his claim that he made the entire trip by air from New York City to Los Angeles and an additional trip to Tijuana merely for the purpose of recovering license plates upon a vehicle that he had sold in New York City [R.T. 73-75].

The false statements included the statement that he flew from New York by himself (contradicted by his later statement); the statement that he drove to Tijuana by himself (contradicted by his later statement); the statement that he came to the West Coast "to see the country" (contradicted by his later statement); the statement that a Mexican purchased the Cadillac in New York City on March 22 and drove away (contradicted by the fact that the Cadillac was westbound in New Mexico on March 21); the statement that he had never been to California before May 1965 (contradicted by airline records and Diners' Club records); the statement on the telephone to the effect that he did not know anything about a 1963 Cadillac; and the statement by telephone that the vehicle was coming to California for resale [R.T. 73-75, 109-10, 142-43, 145-46, 174-75, 201-03].

While the facts of each conspiracy case are unique, there are some definite similarities between the evidence herein and the facts involved in Curtis v. United States, 297 F. 2d 639 (5th Cir. 1961), cert. denied 369 U.S. 838 (1962), and Meyers v. United States, 310 F. 2d 801 (5th Cir. 1962).

In Curtis, supra, and in Meyers, supra, as in the instant case, the defendant in question did not enter the United States with the marihuana. In each case, the evidence was circumstantial. In Curtis, the evidence against appellant Athens primarily involved his connection with the smuggler on her trip to Mexico, as well as his false statements and use of an alias.

His conviction was affirmed.

In Meyers, the defendant walked across the border about 1 hour and 45 minutes after his wife drove into the United States with a load of marihuana. The other evidence against him involved his possession of some gloves and cologne, scratches upon his arms, the small amount of money in possession of his wife, and the fact that he shared a Mexican hotel room with her up to four days before the smuggling incident occurred. His conviction was affirmed:

> "We think the circumstances taken together as a whole completely foreclose any other conclusion than that the wife and husband had made what they thought was a shrewd plan to have her smuggle the stuff in and, after it had been safely smuggled in, the defendant was to rejoin her in Laredo." (at p. 802).

F. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION OF APPELLANT LAMENCA.

Appellant Lamenca contends that the evidence was insufficient to sustain his conviction. Since the existence of a conspiracy involving Meza-Bustamonte and others was shown, the question is whether the Government satisfied the "slight evidence" test. Once the existence of a conspiracy is shown, "slight evidence is all that is required to connect the defendant with the conspiracy."

Diaz-Rosendo v. United States, 357 F. 2d 124, 130 (9th Cir. 1966), cert. denied, 385 U. S. 856 (1966);

Sabari v. United States, 333 F.2d 1019, 1021 (9th Cir. 1964).

In view of the fact that appellant Lamenca was the employee of appellant Santos [R.T.91], the nature of the business becomes signigicant in view of the following chronology of events:

October 9, 1964 - October 13, 1964 - Lamenca in Hollywood, California.

October 21, 1964 - October 28, 1964 - Lamenca in Hollywood.

December 9, 1964 - Date of New York - Los Angeles flight billed to Santos.

January 29, 1965 - February 22, 1965 - Lamenca in Hollywood, living with "J. Perez" (i.e., Wilfredo Perez).

March 21, 1965 - Lamenca and "Iglesias" (i.e., Perez) driving Santos Cadillac westward in New Mexico.

March 22, 1965 - April 8, 1965 - Lamenca registered in Hollywood motel with "Islesia."

April 6, 1965 - Santos sends Lamenca trans-continental telegram: "Come today. Joe."

May 4, 1965 - Call from Lamenca telephone in West New York to Tijuana, Mexico.

May 6, 1965 - Lamenca flies to West Coast from New York, admittedly with Santos at expense of Santos.

May 7, 1965 - Santos and Meza-Bustamonte arrested at San Ysidro. Lamenca in motel with $4500, states that it belongs to Santos.

Lamenca was a resident of New York or New Jersey throughout this entire period [R.T.119-20,139-41]. Since Santos was ostensibly engaged in the bakery business [R.T.214], it is evident that his employee, Lamenca,

didn't have much time for baking during his constant travels between the East Coast and the West Coast.

The natural inferences from the evidence lead to the conclusion that Lamenca drove the Cadillac to the West Coast for the purpose of transporting the large load of marihuana back to New York after a rendezvous with Meza-Bustamonte at the Highlander Motel; that Santos left the Cadillac with Becerra as security for payment of the marihuana after delivery, for which purpose Lamenca had $4500 in cash (probably having anticipated a larger delivery); that S ntos kept the Cadillac receipt as security for the return of the Cadillac by Becerra but hid it under the floor mat in order to avoid any suspicion by officers, who might be aware of Becerra's occupation as a peddler; that Meza-Bustamonte had the telephone number so he could call the Tijuana conspirators in case something went wrong; that Santos had the same telephone number for the same reason; and that Santos claimed to know nothing about the Cadillac at the time of the New Mexico telephone conversation because he knew that the Cadillac and Lamenca were involved in a major criminal conspiracy.

The jury also could reasonably consider consciousness of guilt to be the motive for Lamenca's various false statements, including the statement that he had gone to see a movie that day but did not remember what it was about; the false address; and the false statement to Officer Benavidez on March 21 regarding the girl friend of Santos. [R.T.91, 106, 139-40, 146].

Appellant Lamenca argues that the officers did not arrest him and also argues that Meza-Bustamonte claimed that he did not know Lamenca. The failure of the officers to arrest Lamenca would not be important, even if it

be assumed that all of the evidence was before them on that occasion. Meza-Bustamonte's testimony, repeatedly impeached and obviously rejected by the jury, provides small support for Lamenca's position.

In view of the decision of this Court in Eason, supra, and the decision of the Fifth Circuit in the case of appellant Athens in Curtis, supra, it is respectfully submitted that the jury correctly decided the issue of appellant Lamenca's guilt or innocence.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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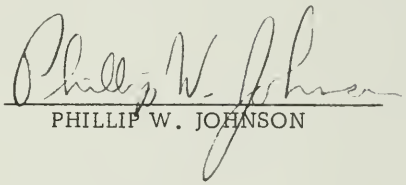
CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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